No. 89-628
No. 89-640

Supreme Court, U.S.
FILED
MAR 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-628

MOUNTAIN STATES LEGAL FOUNDATION, ET AL.,
Petitioners,

vs.

NATIONAL WILDLIFE FOUNDATION,
Respondent.

AND

No. 89-640

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

vs.

NATIONAL WILDLIFE FEDERATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF AMERICAN MINING CONGRESS

JERRY L. HAGGARD
Counsel of Record
GERRIE APKER KURTZ
APKER, APKER, HAGGARD & KURTZ, P.C.
2111 East Highland Ave., Suite 230
Phoenix, Arizona 85016
Telephone (602) 381-0085
EDWARD M. GREEN
Chief Counsel
American Mining Congress

Attorneys for *Amicus Curiae*,
American Mining Congress

Petitions for Certiorari filed in No. 89-628 and No. 89-640 on October 18, 1989. Petition granted in No. 89-640 on January 16, 1990, and Petition pending in No. 89-628.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED	ii
INTEREST OF *AMICUS CURIAE*	2
INTRODUCTION AND PROCEDURAL HISTORY	2
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. THE SEPARATION OF POWERS DOCTRINE BARS NWF'S SUIT	7
A. NWF'S SUIT DOES NOT PRESENT A JUSTICIABLE CASE OR CONTROVERSY	7
B. NWF'S SUIT IMPERMISSIBLY SEEKS REVIEW OF AN ENTIRE GOVERNMENTAL PROGRAM	14
II. NWF FAILED TO ESTABLISH STANDING	16
A. NWF FAILED TO ALLEGE RECOGNIZABLE INJURY AND USE OF PARTICULAR LAND AFFECTED BY BLM ACTION	16
B. THE *SCRAP* DECISION DOES NOT CONTROL IN THIS CASE	18
C. THE PROGRAM CAUSES NO INJURY	19
D. THE STANDING REQUIREMENT AND SHOWING OF INJURY ARE NOT SATISFIED IN THIS THREE-PARTY CASE	20

Page

E. NONSPECIFIC ALLEGATIONS OF INJURY IN TWO GEOGRAPHIC AREAS CANNOT EXTEND STANDING TO CHALLENGE THE ENTIRE PROGRAM. 22

CONCLUSION 25

Amicus Curiae adopts the Appendix filed by the Federal Petitioners with their Petition for Writ of Certiorari in Docket 89-640. References to pages in that Appendix shall be stated as "App." followed by the page number(s).

TABLE OF AUTHORITIES CITED

Cases *Page*

Allen v. Wright, 468 U.S. 737 (1984) 8, 9, 14, 20, 21

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 14

Association of Data Processing Service Organizations, Inc., v. Camp, 397 U.S. 150 (1970) 15

Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87 (1983) 16

Blum v. Yaretsky, 457 U.S. 991 (1982) 15

Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984) 11–12

Defenders of Wildlife, Friends of Animals v. Hodel, 851 F.2d 1035 (8th Cir. 1988) 14, 15

FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981) 15

International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v. Brock, 477 U.S. 274 (1986) (*"UAW v. Brock"*) 15, 23

Kleppe v. Sierra Club, 427 U.S. 390 (1976) 16

NAACP v. Secretary of Housing & Urban Dev., 817 F.2d 149 (1st Cir. 1987) 15

National Wildlife Federation v. Burford, 676 F. Supp. 271 (D.D.C. 1985) 4

National Wildlife Federation v. Burford, 676 F. Supp. 280 (D.D.C. 1986) 4

National Wildlife Federation v. Burford, 699 F. Supp. 327 (D.D.C. 1988) 5

National Wildlife Federation v. Burford, 835 F.2d 305 (D.C. Cir. 1987) (*"Burford I"*) 4, 5, 6, 12, 13, 19

	Page
National Wildlife Federation v. Burford, 844 F.2d 889 (D.C. Cir. 1988)	5
National Wildlife Federation v. Burford, 878 F.2d 422 (D.C. Cir. 1989) ("*Burford II*")	6, 8, 15, 21, 22, 23, 24, 25
National Wildlife Federation v. Hodel, 839 F.2d 694 (D.C. Cir. 1988)	15
Oregon Environmental Council v. Kunzman, 817 F.2d 484 (9th Cir. 1987)	15, 16
Public Citizen v. U.S. Dept. of Justice, ___ U.S. ___, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989)	13
Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978)	24
Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970)	17
Sierra Club v. Morton, 405 U.S. 727 (1972)	16, 17, 20, 24
Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976)	19
United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973)	14, 16, 18, 22
Warth v. Seldin, 422 U.S. 490 (1975)	19, 23
Watt v. Energy Action Educational Foundation, 454 U.S. 151 (1981)	15
Wilderness Society v. Griles, 824 F.2d 4 (D.C. Cir. 1987)	17, 18, 20, 21

Constitution, Statutes, Regulations, and Rules:

United States Constitution: Article III	8
Clean Air Act, 42 U.S.C. 7607(d)	10

	Page
Clean Water Act, 33 U.S.C. 1365	10
Federal Land Policy and Management Act of 1976	2
43 U.S.C. 1701	4, 8
43 U.S.C. 1702(j)	2
43 U.S.C. 1713	19
43 U.S.C. 1714(l)	2
43 U.S.C. 1716(a)	19
43 U.S.C. 1732	8, 20
43 U.S.C. 1761	19
Mineral Lands Leasing Act 30 U.S.C. 201, 211, 226(a), 241(a), 261, 271, 281	19
Mining and Minerals Policy Act of 1970, 30 U.S.C. 21a	3
National Critical Materials Act of 1984, 30 U.S.C. 1801(a)	4
National Environmental Policy Act of 1982, 42 U.S.C. 4321, et seq	16, 19
National Materials and Minerals Policy, Research and Development Act of 1980, 30 U.S.C. 1602-1605	3
Surface Management Regulations, 43 C.F.R. 3809.1-4, 3809.2	20

Other References:

Alpert, Peter, "Citizen Suits Under The Clean Air Act: Universal Standing For The Uninjured Private Attorney General?", 16 Boston College Environmental Affairs L. Rev. 283 (1988-1989)	10
American Law of Mining, Volume 5, Title XV; Chapter 166 (2d ed. 1984)	20

	Page
Coyle, Kevin, "Standing of Third Parties to Challenge Administrative Agency Actions", 76 Cal. L. Rev. 1061 (1988)	8
H.R. Rep. No. 1163, 94th Cong., 2d Sess. (1976)	2
Public Land Law Review Commission, *One Third of The Nation's Land* (1970)	3
Rabkin, Jeremy, *Judicial Compulsions: How Public Law Distorts Public Policy,* (1989)	11, 12
Scalia, Antonin, "The Doctrine of Standing as an Essential Element of the Separation of Powers," 17 Suffolk U. L. Rev. 881 (1983)	10

No. 89-628
No. 89-640

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-628

MOUNTAIN STATES LEGAL FOUNDATION, ET AL.,
Petitioners,

vs.

NATIONAL WILDLIFE FOUNDATION,
Respondent.

AND

No. 89-640

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

vs.

NATIONAL WILDLIFE FEDERATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF AMERICAN MINING CONGRESS

INTEREST OF *AMICUS CURIAE*

American Mining Congress (a Colorado non-profit corporation) is a trade association composed of (1) producers of most of America's metals, coal, and industrial and agricultural minerals; (2) manufacturers of mining and mineral processing machinery, equipment, and supplies; and (3) engineering, consulting, and financial firms and institutions that serve the mining industry. Because of the wide-ranging and negative impact of NWF's suit on the mining industry, the American Mining Congress is keenly interested in the outcome of this case. This *Amicus Curiae* supports Secretary of the Interior Manuel Lujan, Jr., Director of the Bureau of Land Management Cy Jamison, the Department of the Interior, and Mountain States Legal Foundation in this case.

INTRODUCTION AND PROCEDURAL HISTORY

The Withdrawal Review Program ("the Program") was mandated by Congress in the Federal Land Policy and Management Act of 1976 ("FLPMA"). FLPMA requires the Secretary of the Interior, by October 21, 1991, to conduct and complete a review of withdrawals[1] of public lands administered by the Bureau of Land Management ("BLM") and authorizes the Secretary to terminate withdrawals (other than those made by Congress). 43 U.S.C. 1714(l). Congress noted that administrative restrictions on public land use had increased and there had been a failure to examine past withdrawal actions to determine their continuing value. H.R. Rep. No. 1163, 94th Cong., 2d Sess. at 19 (1976). Accordingly, Congress established the Program to correct this problem of excess withdrawals.

---

[1] FLPMA defines a "withdrawal" as "withholding an area of federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws . . . ." 43 U.S.C. 1702(j).

On July 15, 1985, National Wildlife Federation ("NWF") filed a suit against the United States Department of the Interior claiming that under the Program the BLM was improperly terminating more than 788 land classification and withdrawal orders on lands administered by the BLM. NWF complained that the termination of these orders could interfere with the enjoyment of the lands by NWF members. NWF prayed for immediate injunctive relief to (1) freeze land classifications and withdrawals as of their status on January 1, 1981 (a date four and one-half years prior to NWF's filing of the suit) and (2) enjoin the BLM from taking actions inconsistent with the classifications and withdrawals existing in 1981. Then, with the injunction in place, NWF would have the District Court require the BLM to repeat a multiple series of land planning studies and prepare an environmental impact statement ("EIS") on each individual land classification termination and land withdrawal revocation, an EIS on the cumulative effect of those actions, and an EIS on the Program itself. The effect of the relief sought by NWF would be to perpetuate indefinitely the withdrawals and classifications and, simultaneously, exclude virtually every land use, all contrary to Congress' purpose in establishing the Program.

The 180,000,000 acres of public land on which this NWF suit would exclude all resource development constitute more than one-half of all lands administered by the BLM and forty-four percent of all lands owned by the federal government in the western United States, excluding Hawaii and Alaska. Most of the known domestic resources of metallic minerals, other than iron, are situated in the western United States and there is a strong probability that the public land areas of the West hold greater promise for future mineral discoveries than any other region. Public Land Law Review Commission, *One Third of the Nation's Land*, 121, 122 (1970).

Congress has pronounced as a national policy that the domestic mining industry is essential to the United States' security and prosperity, 30 U.S.C. 21a, 1602–1605,

1801(a), and mandated that the public lands be managed in a manner to implement that policy, 43 U.S.C. 1701(a)(12). If NWF succeeds in freezing all economic uses on these vast areas of public lands, the resource base for mineral supply to this nation will be reduced drastically. Thus, the relief NWF seeks in this suit would be absolutely contrary to Congressional policy and to the nation's interests.

In support of its claim to have standing to make this challenge, and as evidence of the extent to which its members use this public land, NWF submitted affidavits from two members who claimed to recreate in the vicinity of certain public lands subject to the Program. (App. 187a–192a.) On the basis of these two affidavits, NWF would prohibit all but environmentalist uses on the 180,000,000 acres of federal public lands in question. The District Court initially upheld the evidence of standing as sufficient to survive a motion to dismiss and granted the preliminary injunction.[2]

The Court of Appeals, in a split decision, found that the District Court did not abuse its discretion in granting the preliminary injunction, *Burford I,* at 327 (App. 84a–85a)[3], and upheld the District Court's finding that enough had been alleged by NWF as to its standing to survive the motion to dismiss. *Burford I,* at 311–314 (App. 48a–57a). Circuit Judge Williams, however, filed a vigorous dissent criticizing the granting of the preliminary injunction on NWF's slim proofs.[4] And, in a subsequent opinion

---

[2] *National Wildlife Federation v. Burford,* 676 F.Supp. 271, 277, 279 (D.D.C. 1985) (App. 119a–136a, 130a and 136a). *See also National Wildlife Federation v. Burford,* 676 F.Supp. 280 (D.D.C. 1986) (App. 137a–150a).

[3] "*Burford I,*" the first opinion of the Court of Appeals in this case, is reported as *National Wildlife Federation v. Burford,* 835 F.2d 305 (D.C. Cir. 1987) (App. 38a–115a).

[4] In his dissent Circuit Judge Williams stated:

denying motions for rehearing, the Court of Appeals expressed its concern about the serious ramifications of this case and the fact that it had proceeded thus far on only cursory showings presented by NWF.[5] Subsequently, when the District Court undertook more deliberate consideration of the case on cross-motions for summary judgment, it granted judgment against NWF on the basis of lack of standing,[6] specifically finding that the NWF member affidavits were insufficient.

> The majority today upholds a district judge's self-appointment as *de facto* Secretary of the Interior over 180 million acres – nearly one-fourth of all federal lands and more than half of the public lands managed by the [BLM]. It does so without a showing that the BLM breached any legal requirement as to a single parcel of land. Even assuming such a breach, the record is barren of any hint that it was material or likely to harm plaintiffs' interests – much less irreparably. Unable to sanction such a judicial usurpation of power, I dissent.

835 F.2d at 327 (App. 85a).

[5] The Court of Appeals noted (emphasis added):

> It has been over two years since the preliminary injunction was issued. As we stated in our opinion, "[t]his is a serious case with serious implications." 835 F.2d at 327. We noted then, and continue to believe, that some of the criticisms of the breadth and scope of the preliminary injunction offered in the vigorous dissent are not without force. *In addition, we are aware that the district court injunction has placed on "hold" for over two years a complex governmental effort to review and adjust its classifications of vast tracts of land. It is also beyond dispute that countless parties are affected by the uncertainties associated with the unsettled status of these lands.* For these reasons, we believe that the disposition of these millions of acres should not continue to rest any longer than necessary on the foundation of a preliminary injunction which was entered on consideration of the brief affidavits and cursory materials presented to the court below.

844 F.2d 889, at 889 (App. 117a–118a) (D.C. Cir. 1988).

[6] *National Wildlife Federation v. Burford*, 699 F.Supp. 327 (D.D.C. 1988) (App. 26a–37a).

The Court of Appeals reversed this judgment on the ground that since it had found there was sufficient standing in *Burford I* to survive a motion to dismiss, that finding was the law of the case even on a motion for summary judgment. *Burford II*, at 432–433 (App. 18a–20a).[7] The Court of Appeals further said that, in any event, the affidavit of NWF member Peggy K. Peterson alone was sufficient to support standing. *Burford II*, at 431 n. 13 (App. 18a).

From the *Burford II* decision, Petitions for Writ of Certiorari were filed by Mountain States Legal Foundation, et al., in No. 89-628 and by Manuel Lujan, et al., in No. 89-640. The Petition in No. 89-640 was granted by this Court on January 16, 1990. *Amicus Curiae* is informed that, as of the writing of this brief, the Petition in No. 89-628 remains pending.

SUMMARY OF ARGUMENT

The Court should reverse *Burford II* because that opinion ignores the constitutional limits on the role of the federal judiciary. The essence of this dispute is whether NWF should be permitted to use the federal courts to change national policy and exclude mining and other resource uses on the vast areas of the public lands which are subject to this suit. This is a political question for Congress to decide, not a "case or controversy" for the courts to decide. If NWF wishes to reshape the national policy, it must do so through the democratic legislative and executive branches of the government and not through the judiciary. Accordingly, NWF's suit is barred by considerations more fundamental than standing. If this Court agrees that NWF is asking the courts to intrude on the representative branches of government, then it is not necessary to reach the question of

---

[7] *"Burford II,"* the Court of Appeals opinion here under review, is reported as *National Wildlife Federation v. Burford*, 878 F.2d 422 (D.C. Cir. 1989) (App. 1a–25a).

whether the NWF member affidavits concerning standing were sufficient.

Further, in order to grant the relief sought by NWF, the District Court will be forced to review and administer an entire governmental program. Administration of federal agency programs is neither practicably nor legally the proper use of the federal judiciary. The vastness of the public lands requires that direction for their management be provided initially by broad programs, such as the Withdrawal Review Program, to be implemented by individual actions on specific land areas. If a person is injured by such a specific action, that person may have standing to seek redress in the courts for that action, but not for the entire Program guiding other actions which do not affect that person.

Finally, this Court should find that the standing evidence offered by NWF is defective under even the most liberal standing cases. First, the allegations of injury by NWF are fatally flawed for failing to identify with particularity any lands they use which are included in the Program, the specific other uses of those lands which would injure the NWF members, or the lands which would be damaged by those other uses. Second, the injury alleged by NWF does not support standing for the over-reaching and premature relief requested.

ARGUMENT

I. THE SEPARATION OF POWERS DOCTRINE BARS NWF'S SUIT.

A. NWF's Suit Does Not Present A Justiciable Case or Controversy.

NWF's suit essentially seeks to have the judiciary run the BLM Withdrawal Review Program in accordance with NWF's view of what public land policy should be. But, it is the BLM which is charged with managing the public lands under the principles of multiple use and which is

bound to make its decisions concerning public land after considering the competing interests, as guided by the policies set forth in FLPMA and other national policies established by Congress. 43 U.S.C. 1701, 1732. The administration of the Withdrawal Review Program by the BLM is a political matter determined and delegated by Congress, not a justiciable question. The separation of powers doctrine requires the federal courts to limit their authority to justiciable questions and to refrain from the political aspects of government.[8] *Allen v. Wright,* 468 U.S. 737 (1984).

Amicus Curiae submits that the separation of powers doctrine is a concept even more fundamental than standing. Standing focuses on whether the particular plaintiff properly brings a case within the judicial limits of Article III of the United States Constitution. The separation of powers doctrine, though also rooted in Article III, focuses on the justiciability of the issue. If, in order to satisfy the plaintiff, the federal court must encroach upon the realm of the legislative or executive branch of the government, then the separation of powers doctrine bars the suit. *Allen,* above, at 759–760. Thus, the thresheld inquiry is whether, under our tripartite system of government, federal courts should undertake the case.[9]

In *Allen,* at 759–760 (emphasis added), this Court stated:

> The idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that the respondents' alleged injury "fairly can be traced to the challenged action" .... That conclusion would

---

[8] This issue was raised before the Court of Appeals, but is not squarely addressed in the *Burford II* decision.

[9] An analysis of this principle is provided in Coyle, "Standing of Third Parties to Challenge Administrative Agency Actions," 76 Cal. L. Rev. 1061, 1091–1093 (1988).

> pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. *Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication.*

The very problem this Court warned against in *Allen* is the situation in this case. NWF has not complained of a specific violation of law which has in fact harmed any of its members. Instead, though complaining that there are general violations of the law, NWF in reality challenges the entire program the BLM has established to carry out the congressionally mandated reviews of public land withdrawals. This Court stated that it is inappropriate to use the judiciary to restructure the programs established by the executive branch:

> When transported in the Art III context, [the principle that government be granted the widest latitude in the dispatch of its own internal affairs], grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. *The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to "take Care that the Laws be faithfully executed."* US Const, Art II, § 3. *We could not recognize respondents' standing in this case without running afoul of that structural principle.*

Allen, at 761; emphasis added.[10]

---

[10] To be sure, Congress itself is guilty of intruding upon the sep-

More harm is done by allowing actions such as NWF's suit than simply an injudicious intrusion upon the proper functions of other branches of government. When special interest groups, such as NWF, succeed in convincing a court to undertake review of a governmental program, they obtain an inappropriate advantage in terms of greater clout and more attention than is warranted vis-a-vis all the other interests which should be considered in the formulation of public policy.[11] Like all advocates, special interest groups are not concerned with presenting to a court all relevant considerations which should be involved in forming public

---

aration of powers by attempting to grant universal standing in some environmental legislation, such as in the Clean Air Act, 42 U.S.C. 7607(d), and in the Clean Water Act, 33 U.S.C. 1365. On the subject of these congressional intrusions it has been observed:

> Justice Scalia believes that standing is ultimately related to separation of powers concerns. The power of Congress to expand standing is, therefore, inescapably limited. In Scalia's view, congressional approval, express or implied, to expanding standing "cannot validate judicial disregard" for the boundaries that exist between branches of government.
>
> * * *
>
> A universal grant of standing, even though an "acquiescence" of Congress to judicial intervention, forces courts to hear the claims of the majority because plaintiffs need not allege palpable injuries that set themselves apart from the general public. . . . The democratic process that inheres in the executive and legislative branches, and not the undemocratic process that inheres in the courts, should resolve and protect the interests of "all-inclusive" classes of citizens.

Alpert, "Citizen Suits Under the Clean Air Act: Universal Standing For the Uninjured Private Attorney General?," 16 Boston College Environmental Affairs L. Rev. 283, 304–305 (1988–1989); footnotes omitted; referring to Justice Scalia's "The Doctrine of Standing as an Essential Element of the Separation of Powers", 17 Suffolk U. L. Rev. 881 (1983).

It is important to note that here NWF is not suing on the basis of legislation where Congress has attempted a universal grant of standing.

[11] The proper forum for special interest groups to demand attention for their agenda is through the more deliberate and democratic legislature.

policy. Instead, they focus primarily on presenting only the issues which they hope will allow them to prevail in the matter under dispute.[12] The very fact that a special interest group has convinced a court to take a case indicates that group's notion of public policy has caught the court's attention and, perhaps, the court has allowed itself to become a vehicle or even a champion of the special interest group's view of public policy. This Court has admonished the federal judiciary to refrain from such judicial activism. *See Chevron U.S.A. v. Natural Res. Def. Council,* 467 U.S. 837, 865–866 (1984), wherein this Court stated:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.
>
> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of

---

[12] Rabkin, Jeremy, *Judicial Compulsions: How Public Law Distorts Public Policy,* pp. 63–64, (1989).

> the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones. . . .

Permitting special interest groups to bring broad policy lawsuits against administrative agencies is "essentially a means by which courts grant particular private advocates privileged claims on the conduct of public policy."[13] In his dissent in *Burford I,* Circuit Judge Williams charged that undue influence for the environmentalists' agenda was the very result in this case:

> The injunction . . . makes no effort to minimize the *aggregate* harm to the public interests in both environmental preservation and alternative activities: the district court has allowed environmental interests, however weak and however trivially they may be at risk as to particular tracts, to sweep the other interests off the board.

835 F.2d at 340 (App. 114a–115a).

Amicus Curiae submits that these concerns are very real. If NWF succeeds in proceeding with this case, then the ability of the BLM to make judgments based on the many relevant policy considerations will be limited, with undue attention being given to NWF's view. The congressionally pronounced national policy that public lands should

---

[13] *Id.*, at 64.

be managed in a way which fosters domestic mining, thus, will be thwarted. As noted in the concurring opinion of Justice Kennedy, joined by Chief Justice Rehnquist and Justice O'Connor, in *Public Citizen v. U.S. Dept. of Justice*, ____ U.S. ____, 109 S. Ct. 2558, 2573, 105 L. Ed. 2d 377 (1989), maintaining the separation of powers is one of the most vital functions of the Court. Special interest groups still may, and properly should, pursue their political agendas in the political realm of government.

Another problem (which will be further discussed in the next section of this argument) with cases such as NWF's is that the judiciary is asked to assume an enormous and time-consuming task. Instead of selecting one or even several BLM decisions resulting in some proposed activity on land which it could precisely locate and for which it might produce an injured member who actually used that land, NWF attached to its Amended Complaint (paragraph 18) a list of 788 BLM land actions, stating that its claim was not limited to those 788 land actions. NWF neither precisely located the lands involved in those actions for the court (a defect noted in the *Burford I* dissent, at 329 and 337; App. 89a–90a and 107a–108a), nor produced members who could claim injury as to any of them. NWF's goal was to have the court perform the work of the BLM while wearing NWF-supplied blinders. The District Court had monumental difficulties administering the preliminary injunction during the period it was in effect.[14] Thus, the problems that arise from suits such as NWF's dramatically reaffirm that the function of the judiciary must be kept separate from the legislative and executive functions of the government.

---

[14] As noted at pages 7–8 of the Federal Petitioners' brief in support of their Petition for Certiorari (Docket 89-640), several modifications of the preliminary injunction were necessitated to limit its original scope. In at least one instance, NWF itself was constrained to ask for relief. Congress, at the behest of affected parties, legislated other limits on the effect of the preliminary injunction.

B. NWF's Suit Impermissibly Seeks Review of an Entire Governmental Program.

No matter what is thought of NWF's claims to have satisfied the required showings for standing (discussed below) and no matter what is thought of the minimal requirements which have been allowed to establish standing under cases like *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), and *Defenders of Wildlife, Friends of Animals v. Hodel*, 851 F.2d 1035 (8th Cir. 1988), this case is outside of the universe of cases that may properly be undertaken by the federal courts because it requires the judicial administration of an entire agency program.

This Court's opinions in *Allen*, above, and *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), affirm the rule that the nation's courts cannot be in the business of running governmental programs. Not only would such involvement in the daily affairs of the federal agencies run afoul of the separation of powers doctrine, it would also be a ludicrous use of judicial resources. In this case NWF is not challenging the validity of a regulation or even the application of a regulation to a particular set of facts. Instead, NWF is challenging the entire Program being carried out by the BLM on over a hundred million acres of public land. NWF sought to control too much with too little and, thus, by its own over-zealousness, brought a suit which cannot properly be maintained.

NWF, in its brief responding to the Petitions for Certiorari, would have this Court believe that this suit is no different from others where a particular federal agency action is challenged. And, NWF cites a string of cases in footnote 21 of that brief claiming that those cases support the notion that the federal courts have frequently engaged in reviews of entire programs. Each of those cases is readily distinguishable from this case and falls into one of the following categories: (1) single agency decisions (as opposed to

the 1,250 or so decisions in this case), (2) a single interpretation of one part of an agency's mandate, (3) specific regulations, or (4) the required geographic scope of a single EIS.[15] Thus, none of the "program review" cases relied upon by NWF supports the claims made by NWF.

NWF's attempt to salvage its standing by relying on *NAACP v. Secretary of Housing & Urban Dev.*, 817 F.2d 149 (1st Cir. 1987) is likewise unavailing. In the present case, NWF claims to be challenging a "pattern of conduct" rather than the hundreds of separate land use decisions by the BLM. The *NAACP* case did indeed allow a "pattern of conduct" challenge, but the focus was whether the Department of Housing and Urban Development was meeting its statutory goal of promoting fair housing. In fact, the court in *NAACP* expressly noted that the NAACP was not challenging the individual instances of agency action. Try as it will to claim otherwise, NWF is in fact challenging the 1,250 decisions made by the BLM. *Burford II*, at 430–431, n.12 (App. 16a).

NWF is dissatisfied that the BLM has not made environmental concerns supreme over all other factors the

---

[15] The cases relied upon by NWF for review of an entire governmental program are: *UAW v. Brock*, 477 U.S. 274 (1986), interpretation of a benefits entitlement statute; *Oregon Environmental Council v. Kunzman*, 817 F.2d 484 (9th Cir. 1987), geographic scope of an EIS; *Blum v. Yaretsky*, 457 U.S. 991 (1982), determination of uniform level of benefits to be applied with respect to stated medical evaluations; *Watt v. Energy Action Educational Foundation*, 454 U.S. 151 (1981), choice of competitive bidding procedures under a statute requiring experimentation with different procedures; *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981), does not address standing, pertains to an agency policy statement; *Association of Data Processing Service Organizations, Inc., v. Camp*, 397 U.S. 150 (1970), single decision to allow banks to engage in a certain business; *Defenders of Wildlife, Friends of Animals v. Hodel*, above, single decision concerning exemption of projects in foreign countries from application of federal endangered species statute; and *National Wildlife Federation v. Hodel*, 839 F.2d 694 (D.C. Cir. 1988), challenge to twenty-one regulations, with proof of standing required as to each regulation.

BLM *by law* must consider. As noted in *Baltimore Gas & Electric Co. v. NRDC*,462 U.S. 87, 97 (1983), the National Environmental Policy Act of 1982, 42 U.S.C. 4321, *et seq.*, ("NEPA") requires agencies to consider environmental impacts before acting, but it does not require environmental issues to occupy the entire field.

And finally, NWF claims that *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), aids its standing argument. Like *Oregon Environmental Council*, above, *Kleppe* is a challenge to the geographic scope of an EIS. The Sierra Club wanted to force the Interior Department to issue a regional EIS concerning northern plains coal mining. This Court rejected that claim on the ground that there was no proposal of regional mining to be evaluated. Thus, *Kleppe* hardly offers any support for NWF's position in this case.

II. NWF FAILED TO ESTABLISH STANDING.

In holding that NWF had made an allegation of injury sufficient to establish standing, the Circuit Court below relied largely on *Sierra Club v. Morton*, 405 U.S. 727 (1972) and *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, above ("*SCRAP*"). If NWF's action did present a "case or controversy" (which it does not), then this case presents an opportunity for this Court to refine its holdings in *Sierra Club v. Morton* and *SCRAP* relating to standing to sue on environmental and public land issues.

A. NWF Failed to Allege Recognizable Injury and Use of Particular Land Affected by BLM Action.

With respect to the asserted use of the lands affected by federal action, there is no relevant factual difference between *Sierra Club v. Morton*, above, and the present case. In *Sierra Club v. Morton* a ski area and attendant facilities had been proposed for construction on federal lands in an area of the Sierra Nevada mountains in California. The

Sierra Club alleged that it had a special interest in the conservation and sound management of national parks and forests and particularly of the lands on the slopes of the Sierra Nevada mountains. *See Sierra Club v. Hickel*, 433 F.2d 24, 29 (9th Cir. 1970). This Court said: "Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King [the site of the ski area] for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents." *Sierra Club v. Morton*, at 735. Here, the boiler plate allegations in the two NWF members' affidavits (App. 187a, 191a) that they "use the federal lands, including those in the vicinity of" a generalized area of BLM lands from which withdrawals had been revoked is substantially identical to the allegations in *Sierra Club v. Morton*. In neither *Sierra Club v. Morton* nor in the present case did the plaintiffs make sufficient allegations that any of their members used any of the particular lands in question. This was fatal to standing in *Sierra Club v. Morton* and is fatal to standing in the present case.

In fact, NWF has even less basis for standing in this case than the Sierra Club had in *Sierra Club v. Morton*. The Sierra Club objected to a specific proposed project (a ski resort) on a specific area of land. In the present case, NWF has not identified any specific proposed land use which could cause any injury, has not identified any specific land area which would be damaged, and has not identified any specific land area its members use or propose to use (other than "the federal lands"). Although this Court has broadened the categories of injury that may be alleged in support of standing to include aesthetic, conservational, and recreational values, this Court has not abandoned the requirement that identifiable damage to specific lands and particular injury to the plaintiff be alleged. *Sierra Club v. Morton*, at 734–735.

Wilderness Society v. Griles, 824 F.2d 4 (D.C. Cir. 1987), involved a challenge by the Wilderness Society and the Sierra Club to a BLM policy decision not to charge

submerged lands against the grant of acreage entitlements for Alaska and Alaskan natives. In the *Griles* case it was held that affidavits of members of the plaintiff groups, wherein it was claimed that the members visited federal lands throughout the State of Alaska, were *insufficient* to support standing. The Court of Appeals reasoned that members failed to name the specific lands they intended to visit which would be taken out of federal ownership by the challenged BLM policy. The very same flaw in standing proof defeats this case. NWF's member affidavits claimed nothing more specific than recreating "in the vicinity of" only a relatively small part of the enormous expanses of federal land affected by this suit.

B. The *SCRAP* Decision Does Not Control in This Case.

SCRAP is clearly distinguishable from the present case on at least two grounds. First, in *SCRAP* the plaintiffs did assert that they used the lands and breathed the air which they claimed would be damaged by an Interstate Commerce Commission approval of a freight rate surcharge. This Court found that the plaintiffs' allegations were sufficient to establish the "identifiable trifle" of injury necessary to show standing in that case. *SCRAP*, at 689–690. In the present case, however, the fact remains that NWF did not allege that any of its members used any of the particular lands which are subject to the Program. Therefore, not even an identifiable trifle of injury could be alleged by NWF members with respect to those lands subject to the Program.

Secondly, this Court held in *SCRAP* that a plaintiff must allege that he will "be perceptibly harmed by the challenged government action, not that he can imagine circumstances in which he could be affected by the agency's action." *SCRAP*, at 688–689. In *SCRAP*, the freight surcharge could go into effect without further governmental action and cause the events to occur which the plaintiffs alleged would cause damage. *SCRAP*, at 672–674. In contrast, as discussed further below, the government's actions

carried out under the Program cannot create any injury to NWF. It is not unless and until the BLM takes additional actions proposing to authorize particular uses to be carried out on particular lands that NWF could allege injury and then only if NWF asserts that its members use those particular lands. At this stage, NWF only imagines circumstances in which its members would be harmed.

C. The Program Causes No Injury.

This Court has ruled that the alleged injury justifying standing must be fairly traceable to the challenged action, *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 41 (1976), and that the standing question bears close affinity to the question of ripeness – whether the harm asserted has matured sufficiently to warrant judicial intervention, *Warth v. Seldin,* 422 U.S. 490, 499, n. 10 (1975). In the present case the action complained of is the publication of withdrawal and classification revocation notices in the *Federal Register.* This publication merely allows the BLM to (1) consider any applications it may receive to permit resource uses on those lands and (2) evaluate the conditions under which such uses may be carried out.

NWF is premature in seeking to enjoin the revocations because it can suffer no injury until third parties apply for and receive authorization to carry out activities on the lands. Whether a land exchange will be approved, whether BLM lands will be sold, or whether rights of way will be issued, all lie within the discretion of the Secretary of the Interior. 43 U.S.C. 1716(a), 1713, 1761. Similarly, mineral leases on public lands are issued or withheld at the discretion of the Secretary. 30 U.S.C. 201, 211, 226(a), 241(a), 261, 271, 281. Further, as pointed out in the dissent in *Burford I,* at 339 (App. 111a–113a), activities conducted under the mining laws are subject to environmental review under NEPA and (for operations disturbing more than five acres) subject to BLM approval, both of which provide for public

notice and consideration of public comments.[16] 43 U.S.C. 1732; 43 C.F.R. 3809.1-4, 3809.2.

Until there is the further event where the BLM considers the approval of a proposed land use, or at least until an application has been made for use of some of these lands, any allegation by NWF of injury or threatened injury is premature. Therefore, NWF could not properly allege that the challenged withdrawal terminations and classification revocations in themselves cause any injury to anyone, much less to its members, even if the members had identified and alleged they used the lands in question.

D. The Standing Requirement and Showing of Injury Are Not Satisfied in This Three-Party Case.

Cases such as *Sierra Club v. Morton,* above, and the present case, in which a government action allows a third party who is not before the court to respond in a manner that may injure the plaintiff, have been referred to as "three-party cases." *See Wilderness Society v. Griles,* above, at 12. This Court has observed that when an alleged threatened injury could result only from the action of some third party not before the court, the indirectness of the injury weakens the links in the chain of causation and can make it substantially more difficult to meet the standing requirement. *Allen,* above, at 758–759.

In *Allen,* this Court found that it was entirely speculative whether the withdrawal of a tax exemption from

---

[16] In addition to these management controls applying to activities conducted pursuant to the mining laws on public lands, an entire regime of federal and state land use and environmental permitting requirements apply to all mineral exploration and mining operations wherever they are conducted. Virtually all of those permitting procedures require public notice and the opportunity for public participation in the permitting processes. *See* 5 *Am. L. of Mining,* Chapter 166; Title XV (2d ed. 1989).

any particular school would cause parents and school officials to react in a way that would have an ultimate significant impact on the racial composition of public schools and, therefore, the parents of minority school children could not establish the necessary standing to challenge the tax exemption. *Allen,* at 759. In this case, the links in the chain of causation are even weaker because, not only would a third party resource developer have to respond to the Program, but any threat of injury to NWF would require the additional speculation that the BLM would also respond by approving a land use in a particular area.

The *Griles* decision is remarkable because it also is a three-party case dealing with public lands decided by the District of Columbia Circuit which reached a result opposite of that in *Burford II* even though it was decided by two of the same Circuit Judges who decided *Burford II.* The Circuit Court made the following observations in *Griles:*

> Where the alleged injury involves access to land in a three-party case, as in *Sierra Club, SCRAP,* and the case at bar, the judgment regarding likelihood of injury turns on whether the plaintiff's future conduct will occur in the same location as the third party's response to the challenged governmental action. Otherwise, the threat of injury would be too amorphous or uncertain; it would be no greater for the plaintiff than for any person simply opposed to the governmental action in question.

824 F.2d at 12.

In light of *Griles,* it must be considered whether the Circuit Court may have reached its conclusion in *Burford II* because it failed to realize that this case, like *Griles,* is a three-party case in which NWF was not threatened with any injury until a third party sought and was granted authorization from BLM to conduct activities on the lands.

That the *Burford II* court failed to realize this is reflected in the following statement by the court:

> Once the lands in dispute are removed from Government regulation or protection under the [Withdrawal Review] Program, and made available for private mining and other developmental uses, NWF would have no claim against those in control of the land development projects.

Burford II, at 429, n. 10 (App. 12a). This statement is plainly mistaken. As noted above, the dissent in *Burford I* correctly understood that, even in the case of mining, governmental reviews and approvals are still required after the lands have been opened to use.

NWF failed to properly allege injury in the present case, not only because it did not allege that its members use any of the lands in question, but also because it was impossible to identify which of the lands in the Program will be the subject of third-party responses (i.e., applications for leases, permits, or plan of operation approvals) and it was impossible to identify on which of those lands the BLM may consider granting approvals. In this case, actions by third parties and then further action by the BLM are required before NWF could properly allege there would be any injury to NWF. This is in contrast to *SCRAP* in which no further action by third parties or the government was necessary for events to occur which might injure those plaintiffs.

E. Nonspecific Allegations of Injury in Two Geographic Areas Cannot Extend Standing to Challenge the Entire Program.

Even if NWF could have established standing with respect to the two specific withdrawal revocations and classification terminations from lands in the vicinity of the

lands which two of its members alleged they used, this allegation of minimal injury in two geographic areas is certainly not strong enough to spread across the entire western United States and envelop into this litigation some 1,250 individual withdrawal revocations and classification terminations on more than 180,000,000 acres of public land. The Court of Appeals stated that "the applicable law governing standing requires that plaintiffs be injured by only *one* of the terminations" (emphasis by the court) in order to challenge the entire Program, citing *UAW v. Brock*, above, and *Warth v. Seldin*, above. *Burford II*, at 431, n. 12 (App. 16a). These cases relied upon by the Court of Appeals clearly do not support the extension of any NWF standing to all of the land areas and management actions involved in the Program and in this case.

UAW v. Brock simply held that it is not necessary for all members of an association to have standing in their own right for the association to have standing to challenge a Secretary of Labor policy respecting eligibility for supplemental state unemployment insurance benefits, so long as some members of the UAW could show they were injured. *UAW v. Brock*, at 284–286. In *Warth v. Seldin*, this Court denied standing to all of the individual and association plaintiffs in that case, but observed in *dicta* that "The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action. . . ." *Warth v. Seldin*, at 511. The issue raised in both of those cases obviously is not an issue in this case. The number of NWF members who can allege they were injured is not in question in this case and no party has contended that NWF must allege that all of its members were injured. Therefore, neither *UAW v. Brock* nor *Warth v. Seldin* supports the holding in *Burford II* that the establishment of standing with respect to one area involved in the NWF affidavit extends that standing to hundreds of other BLM land areas and some 1,250 BLM actions.

The Court of Appeals also set forth the proposition that if the Peterson affidavit were found sufficient for standing by itself, NWF may assert the interests of the general public with respect to the entire Program. *Burford II,* at 431–432, n. 13 (App. 18a). In support of that proposition, the court cited *Sierra Club v. Morton,* above, and *Sierra Club v. Adams,* 578 F.2d 389 (D.C. Cir. 1978). In *Sierra Club v. Morton,* this Court stated that once a plaintiff establishes standing, he may assert the interests of the general public in support of his claims for equitable relief. *Sierra Club v. Morton,* at 740, n. 15. That statement, however, was made with reference to an attack on a single ski resort project. Nothing is even intimated in that case that would allow the Sierra Club to extend its standing to assert the general public interest in challenges to all other ski areas proposed on public lands in the western United States.

Sierra Club v. Adams involved the Sierra Club attempting to stop construction of a highway in the nations of Panama and Colombia. The Sierra Club first obtained an injunction against the United States' participation until an EIS was prepared and then obtained another injunction based upon three deficiencies in the EIS. The Court of Appeals simply held that once the Sierra Club established standing with respect to one issue in the EIS (spread of hoof and mouth disease) it could challenge other issues (effect of the highway on Indians in Panama and Colombia) on which the Sierra Club may not otherwise have had standing. Again, this case involved a single project and a single area of land like *Sierra Club v. Morton.* It did not determine that the Sierra Club, once having established standing with respect to the United States' participation in that highway, would have standing to challenge a United States program of participating in any other highways in South America. *Sierra Club v. Adams,* therefore, provides no authority for the conclusion reached by the Court of Appeals that, if NWF could assert the public interest in the one area in which the

court said NWF had established standing, NWF could assert the public interest for each of the remaining 1,250 or so individual classification terminations and withdrawal revocations.

CONCLUSION

The *Burford II* decision of the Court of Appeals for the District of Columbia Circuit should be reversed and the decision of the District Court for the District of Columbia District which dismissed NWF's suit should be reinstated.

Respectfully submitted,

Jerry L. Haggard,
Counsel of Record
Gerrie Apker Kurtz
Apker, Apker, Haggard &
Kurtz, P.C.
2111 East Highland Ave., Suite 230
Phoenix, Arizona 85016
Telephone (602) 381-0085

Edward M. Green
Chief Counsel
American Mining Congress

Attorneys for *Amicus Curiae*,
American Mining Congress

March 1990